IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 37

W. G. WELBON, E. N. CLAUGHTON and
A. W. CORBETT,
Petitioners,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONSE TO PETITION FOR REHEARING

The petition for rehearing merely incorporates by reference the grounds argued in the petition for rehearing in No. 24, October Term 1953, St. Joe Paper Co. et al., petitioners, vs. Atlantic Coast Line Railroad Co., respondent. Necessarily, therefore, this response is directed to the matters discussed in that petition.

I.

The answer to the main contention advanced in the petition for rehearing, and particularly to the question on page 6, "Who is to act for the 'carrier'?" (Florida

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East Coast Railway Company), is in the brief on behalf of petitioners herein (No. 37, October Term 1953) in subdivision 2 of the argument, which begins on page 48 and is headed:

> "The 5% Bondholders Are Debtor's Equitable Owners and in That Capacity Are Entitled to Vote Under §5(11) of the Interstate Commerce Act on the Question of Corporate Assent by Debtor to the Merger, Consolidation or Transfer"

and in the further argument on pages 53 to 55, inclusive.

II.

The following statement on page 19 of the petition for rehearing:

> "It is anomalous to speak of a §77 proceeding as if its purpose was to rehabilitate the *debtor corporation* when the statute expressly provides that the debtor corporation may be stripped of everything that it has and allowed to die. The purpose of the statute is manifestly not to rehabilitate the debtor corporation but rather to assure the satisfactory maintenance of carrier services and to treat the security holders fairly and equitably"

takes issue with *Continental Ill N B & T Co v Chicago R I & P R Co*, 294 US 648 (1935) and *Ecker v Western P R Corp*, 318 US 448 (1943).

The opinion in the *Continental Illinois* case says: "Obviously, §77 does no more than follow the line of historical and progressive development projected by previous acts." 294 US 672 It holds that §77 contemplates "an adjustment of a failing debtor's obligations." 294 US 673

The opinion in the *Ecker* case holds that §77 is "bottomed upon the theory of debtor rehabilitation by adjustment of creditors' claims." 318 US 469

III.

The contention on page 23 of the petition for rehearing and in Appendix A thereto that

> "in the case of a transfer of assets authority should be sought under Section 5(2)(b) by the carrier which is purchasing the assets but that it is neither necessary nor proper for the transferor to apply"

overlooks a vital element which is a condition precedent to the submission of any such application by the carrier proposing to make the purchase.

It is that the other carrier—the proposed transferor—must have agreed to sell. There can be no such application unless an agreement of purchase and sale has been made by the two carriers.

A covetous carrier cannot, as was attempted here, submit to the Commission a unilateral offer to purchase the assets of another carrier, and the Commission cannot, as was attempted here, make a counter-offer of sale to the covetous carrier, all without the agreement or consent of the carrier owning the assets.

Respectfully submitted,

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